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No. 127

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNIVERSAL BATTERY COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION OF THE UNITED STATES TO REMAND AND BRIEF IN SUPPORT THEREOF

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MOTION OF THE UNITED STATES TO REMAND

Comes now the United States, the respondent herein, by the Solicitor General, and moves the Court to remand the above-entitled cause to the Court of Claims for additional findings of fact, as hereinafter set forth, in the event that this Court is of the opinion that the decision of the Court of Claims should not be affirmed upon the record as presented to this Court.

This case raises the question whether petitioner established in the Court of Claims that electric storage batteries manufactured and sold by it during the period from March, 1919, to September, 1923, on which excise taxes were paid, were not

"parts or accessories for" automobile trucks, automobile wagons, other automobiles, or motor cycles, within the meaning of Section 900 (3) of the Revenue Acts of 1918 and 1921.

The Court of Claims, in its disposition of the case, made certain findings of fact and concluded that the petitioner was liable for the taxes in question and thereupon rendered a judgment dismissing the petition. These findings show that during the period in question petitioner manufactured and sold several types of storage batteries, any one of which could be used in some automobile; that storage batteries, such as were manufactured by petitioner during said period, were used in motor boats, farm tractors, farm lighting plants, airplanes, baggage trucks, door bells, railways switches, wireless and ordinary telegraphs, radios, telephones, electroplaters, and fire alarms, as well as for automobiles; and that petitioner sold its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and had no means of knowing what percentage of its batteries were used for any particular purpose. (R. 23-24.)

The Government contends that the Court of Claims did not find the following relevant and material facts which were shown by the record in that court:

(1) That petitioner designed the batteries with respect to which excise taxes were paid for the special purpose of being used to replace a component part for automobiles;

(2) That petitioner's business policy was to cater to the needs of automobile and motor-truck owners for replacement batteries.

(3) That the term "automobile storage battery" is used in trade parlance.

Wherefore, it is respectfully prayed that, if this Court is of the opinion, because of incomplete findings, that the judgment below should not be affirmed, an order be entered remanding said cause to the Court of Claims for findings upon each the facts hereinbefore set forth and upon such further and additional facts, if any, as this Court may deem necessary.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

BRIEF ON MOTION TO REMAND

The record below discloses the following:

It was stipulated that the oral testimony taken in the *Cole Storage Battery case* should be considered as a part of the testimony in the instant case, except where it relates particularly to the *Cole case*. (R. 83.) There was uncontradicted testimony that the general construction of the storage battery of the two companies and the manner of manufacturing the batteries by the two companies were the same. (R. 85, 88.) Petitioner was not required to pay taxes on certain batteries designed for radio and certain other specified uses. (R. 87, 91.) Batteries manufactured by petitioner for operating platform trucks and for lighting purposes required a higher capacity than the batteries with reference to which the tax was collected. (R. 93.) Petitioner's business has been to cater to the needs for replacement of batteries on automobiles. (R. 94.) It issued on September 1, 1922, a circular bearing the slogan: "A Battery for Every Make of Car," listing a large number of specified types of batteries as suitable for numerous specified makes of car. This and other circulars specified certain types of batteries as suitable for certain other purposes. (Claimant's Exhibits 1, 2.) The same battery shown in the circular for auto-

mobiles can be used for farm light, radio, truck, tractor, and telephone signal. (R. 95.) The expression "automobile storage battery" is used in trade parlance. (R. 95.)

The testimony in the two cases as to the possible uses to which the batteries taxed might be put and the lack of knowledge of the companies as to the uses for which they actually were put is similar. (cf. R. 86–88 in the *Universal case* with R. 114–115 in the *Cole case*.) In the *Cole case* it appeared that the company sold its batteries to garage men, accessory dealers, radio dealers, jobbers and distributors (R. 115); in the *Universal case* to dealers, distributors, jobbers, some tire shops, automobile accessory shops, farm lighting dealers, and radio dealers (R. 86). In neither case did the petitioner show with even an approximate degree of certainty what percentage of its batteries went to each of these distributing agencies. Practically the only testimony on this point in the *Universal case* appears in the following extract from the testimony of the general manager of the company (R. 88):

> Question. Do you know anything about the percentage of storage batteries used for all the different purposes which you have enumerated, limiting your answer, of course, to the storage batteries manufactured by your company?
>
> Answer. Well, approximately so. We specialize in making replacement batteries and parts.

Question. Just as near as you can, if you have an idea as to the percentage?

Answer. I would say approximately a third of what we might term a starting-lighting battery and sixty-six and two-thirds goes for other work.

Question. Other work—that is, for the other purposes enumerated by you other than for starting and lighting?

Answer. That is right.

It does not appear, however, that this was an estimate of the percentage of those batteries which were taxed.

In the *Cole case* the court made the following finding (R. 20 in the Supreme Court):

> Plaintiff during the period involved in this suit manufactured and sold lighting and starting batteries which were designed for the special purpose of being used to replace a component part for automobiles. The majority of such batteries were of six-volt capacity.

We submit that the same basis exists for this finding in the case at bar as existed in the *Cole case.*

On January 7, 1929, the following motion for new trial in the instant case was filed by petitioner in the court below:

> This case was submitted at the same time as *Cole Storage Battery Company* v. *The United States,* D–784, but is different from that case in that in addition to the major question of whether a storage battery is subject to the excise tax provided by Section 900

(3) of the Revenue Act of 1918 and subsequent years, there is the question of Plaintiff's right to have additional interest upon excessive moneys wrongfully collected by the Collector and subsequently refunded, but without the amount of interest thereon as provided by law and more particularly set forth in Plaintiff's brief now on file herein, to which special reference is now made for the Court's convenience to Rec. pp. 52–59, both inclusive.

It will be observed that this motion for new trial did not question the applicability of the principles decided in the *Cole Storage Battery* case to the pending case. The motion for new trial was overruled March 11, 1929.

On April 30, 1929, the following motion upon behalf of the Government was filed in the court below:

> The United States, defendant herein, by its Assistant Attorney General, respectfully requests the Court for permission to file a motion for amendment of the findings heretofore made by the Court in this case and as grounds for the allowance thereof makes the following showing:
>
> The Court entered judgment for the United States in the pending case December 3, 1928, upon the authority of the Cole Storage Battery Case, 65 C. Cls. 164, but the findings of fact made in the pending case did not cover all of the material facts shown by the record and did not conform to ex-

ceptions filed by defendant to the Commissioner's report which exceptions were similar to exceptions made to like findings made in the Cole Storage Battery Company case and which latter exceptions were sustained by the Court.

The findings made in this case do not conform to the findings made by the Court in the Cole Storage Battery Company case. After judgment was entered herein counsel for the United States conferred with counsel for the plaintiff and counsel for the defendant expressed an intention to file motion for amendment of the findings. Counsel for the plaintiff informed counsel for the Government that it was not his intention to make application for review of the case by the Supreme Court upon the issue as to whether the storage batteries in question were liable to excise taxes but would file a motion for a new trial asking consideration of additional issues raised in the case as to whether additional interest should be allowed to the plaintiff on excise taxes paid by plaintiff and which had subsequently been refunded by the United States. On January 7, 1929, counsel for the plaintiff filed such a motion for new trial which motion for new trial was overruled by the Court March 11, 1929. After March 11, 1929, other counsel was retained by plaintiff and said counsel has informed counsel for the Government that a petition will be filed with the Supreme Court asking that the judgment herein as to all points involved be reviewed by certiorari.

Both the pending case and the *Cole case* were referred to the same Commissioner in the Court of Claims for making findings of fact. The Commissioner made essentially the same findings of fact in each case. The Government filed exceptions to each report on the ground that the findings made were incomplete. In the *Cole case* the Court of Claims sustained the exceptions throughout. In the pending case the Government's exceptions appear to have been overlooked.

The Government's motion to remand for additional findings of fact should be granted unless the decision of the Court of Claims is affirmed upon the existing findings of fact.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

RALPH C. WILLIAMSON,
Attorney.

JANUARY, 1930.

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